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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JAIME A. MARTINEZ, Defendant and Appellant.	B189389 (Los Angeles County Super. Ct. No. BA 266947)

APPEAL from a judgment of the Superior Court of Los Angeles County. William C. Ryan, Judge. Affirmed.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Jaime Martinez of attempted murder (Pen. Code, §§ 187, subd. (a), 664; all further undesignated section references are to the Penal Code) and possession of a firearm by a felon (§ 12021, subd. (a)(1)). The jury also found that he personally and intentionally discharged a firearm causing great bodily injury. (§ 12022.53, subds. (a)(1), (d).) Martinez admitted having served a prior prison term. (§ 667.5, subd. (b).) The trial court sentenced him to a total term of 40 years and 4 months to life.

Martinez appeals, contending that the trial court erred by denying his requested instruction on defense of another and by failing to instruct, sua sponte, on attempted voluntary manslaughter based both on unreasonable defense of another and on sudden quarrel or heat of passion. We find no error and affirm.

BACKGROUND

Late in the evening of June 15, 2004, Martinez was sitting at an outside table at a restaurant in Los Angeles with two friends, Christian Lara and Angela Hernandez, when a group of seven young gay men, including Gilberto Alvarado, arrived. All of the men were unarmed; most were over six feet tall and not skinny, although Alvarado is significantly smaller and about the same height as Martinez. As the group walked past the table where Martinez and his friends were seated, Hernandez asked, "'Hey, are you gay?'" One replied, "'Isn't it obvious?'" Hernandez then said, "'You better get the fuck out of my restaurant, you fucking faggot.'"[1] After the group entered the restaurant, Hernandez said, "'Hold on. I am going in. Watch this.'" She proceeded inside, approached Alvarado, who was waiting to be seated, and called the group "'fucking faggots.'" In response, Alvarado called Hernandez a "'fucking bitch.'" Hernandez "got in [his] face" and asked him what he had said. He answered, "'You are a fucking bitch.'"

Hernandez returned outside, told her companions what had happened inside the restaurant, and ordered Martinez to "'[g]o in there and handle him.'" Hernandez then reentered the restaurant, followed by Martinez. Martinez asked the group, "'Why are you

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1 The record does not indicate that Hernandez had any ownership interest in the restaurant.

talking shit?'" One member of the group, Einstein Largespada, asked Hernandez and Martinez, "'What the fuck is you[] guys' problem?'" Hernandez then slapped or hit Alvarado in the face, causing his left eye to water. Alvarado hit Hernandez back hard, knocking her backward. One group member placed himself between Hernandez and Alvarado. Largespada pushed Martinez back when he appeared to move toward Alvarado. Hernandez tried to hit Alvarado again. Martinez pulled out a gun, approached Alvarado, and shot at his torso at close range. The bullet passed through Alvarado's left arm and lodged in his pelvis, where it still remained at the time of trial. The events inside the restaurant were captured on tape by the restaurant's security video camera.

The Los Angeles County District Attorney filed an amended information that charged Martinez with attempted murder (§§ 187, subd. (a), 664) and alleged that Martinez personally and intentionally discharged a firearm causing great bodily injury (§12022.53, subds. (b)-(d)), that the shooting was a hate crime committed voluntarily in concert with another (§ 422.75, subd. (b)), and that Martinez had served a prior prison term (§667.5, subd. (b)). The information also charged Martinez with being a felon in possession of a firearm (§12021, subd.(a)(1)). Martinez pled not guilty and denied all special allegations.

Trial was by jury. Alvarado, Largespada, Lara, a police detective, and a paramedic who arrived at the shooting scene testified. Among various exhibits and diagrams, the jury viewed the videotape of the shooting as each percipient witness described the events shown on the tape. The defense presented no evidence or testimony. The trial court dismissed the hate crime allegation. The jury found Martinez guilty as charged and found the firearm enhancement to be true.

Martinez admitted his prior felony conviction. The court denied probation and sentenced Martinez to the middle term of 7 years for attempted murder, doubled to 14 because of the prior strike conviction; a one-third middle term of one year and 4 months for possessing a firearm; and a consecutive term of 25 years to life for causing great bodily injury by discharging a firearm, for a total term of 40 years and 4 months to life. Martinez timely appealed.

DISCUSSION

A

Martinez contends that the trial court's refusal to instruct the jury on CALJIC No. 5.32, the use of force in defense of another, was reversible constitutional error. We disagree.

At trial, Martinez' counsel requested that the trial court instruct the jury on CALJIC No. 5.32.[2] The trial court denied the request, stating, "[A]t the point he fired, Miss Hernandez was not being attacked by Mr. Alvarado at all. And, in fact, Mr. Alvarado had fallen back. There . . . was at least one person . . . that was between Mr. Alvarado and Miss Hernandez, and she was trying to take a swing at him, so I don't think this is defense of another either because at the time the shooting occurred, . . . Mr. Alvarado retreated and Miss Hernandez was not under attack."

Defense of another, like self-defense, has both an objective and a subjective component: a defendant must have a reasonable, as well as an actual, belief that the use of force is necessary to protect another person from imminent harm. (See CALJIC No. 5.32; see also *People v. Humphrey* (1996) 13 Cal.4th 1073, 1093 [self-defense]; *People v. Minifie* (1996) 13 Cal.4th 1055, 1064 [self-defense].). Also as with self-defense, the right to defend another is limited only to the use of such force as is reasonably necessary under the circumstances. (CALJIC No. 5.32; see also § 694; *People v. Minifie, supra*, 13 Cal.4th at p. 1065.) The threat defended against must be imminent, creating danger of harm at that very instant. (See *In re Christian S.* (1994) 7 Cal.4th 768, 783.) A trial court must instruct on a defense, with or without a request, only if the defense is supported by substantial evidence (*In re Christian S.*, *supra*, 7 Cal.4th at p. 783; *People v. Miceli*

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[2] CALJIC No. 5.32 provides, "It is lawful for a person who, as a reasonable person, has grounds for believing and does believe that bodily injury is about to be inflicted upon another person to protect that individual from attack. [¶] In doing so, he or she may use all force and means which that person believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent." (See also § 694 ["Any other person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent the offense."].)

(2002) 104 Cal.App.4th 256, 267), that is, evidence that a reasonable jury could find persuasive. (*People v. Lewis* (2001) 25 Cal.4th 610, 645.)

We find no substantial evidence to support an instruction on defense of another. The record indicates that after Hernandez and Alvarado exchanged blows, a friend of Alvarado's stood between them to keep them apart. Neither Alvarado nor anyone else was advancing toward or threatening Hernandez. Instead, Hernandez was attempting to hit Alvarado again. Thus, the record does not support an objectively reasonable belief that Hernandez was in imminent danger of bodily injury, particularly from Alvarado, at the moment that Martinez shot Alvarado. Moreover, in the absence of any testimony from Martinez or any other defense witness, the record also shows no evidence of Martinez subjectively believing that he had to defend Hernandez from imminent harm. Martinez points out that some of Alvarado's friends were big men and because they were in a group they were potentially more dangerous, but in the total absence of evidence of aggressive conduct by any of them, their size and number, without more, does not supply substantial evidence for either the objective or subjective elements of defense of another. In any case, shooting at Alvarado was greatly out of proportion to any possible threatened harm, given that nothing suggested that either Alvarado or his friends were armed.

B

Martinez contends that the trial court erred by failing to instruct, sua sponte, on the lesser included offense of attempted voluntary manslaughter resulting from the actual but unreasonable defense of another.

"Imperfect self-defense is the actual, but unreasonable, belief in the need to resort to self-defense to protect oneself from imminent peril." (*People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1178.) Similarly, "one who kills in imperfect defense of others—in the actual but unreasonable belief he must defend another from imminent danger of death or great bodily injury—is guilty only of manslaughter." (*People v. Randle* (2005) 35 Cal.4th 987, 997.) Our Supreme Court has indicated that where appropriate, a trial court has a sua sponte duty to instruct on imperfect defense of others. (*Id*. at p. 996.) An instruction on a lesser included offense is required, however, only if there is substantial

evidence showing that the defendant is only guilty of the lesser offense. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) On appeal, a reviewing court considers whether the instruction on the lesser included offense was supported by evidence that would allow a reasonable trier of fact to find the elements of the lesser offense beyond a reasonable doubt. (See *People v. Dennis* (1998) 17 Cal.4th 468, 508.)

As we have discussed above, no substantial evidence supports the contention that Martinez subjectively believed that he had to defend Hernandez from imminent harm of any sort. Martinez offered no evidence of such a subjective belief, and the prosecution's evidence does not reveal any basis for such a belief. To posit that Martinez had such a belief would be pure speculation. "'"[S]peculation is an insufficient basis upon which to require the giving of an instruction on a lesser included offense."'" (*People v. Valdez* (2004) 32 Cal.4th 73, 116.)

C

Martinez also contends that the trial court erred by failing to instruct, sua sponte, on attempted voluntary manslaughter from a sudden quarrel or heat of passion.

Sudden quarrel – heat of passion voluntary manslaughter is a lesser included crime of murder. (*People v. Cole* (2004) 33 Cal.4th 1158, 1215-1216.) Again, the court must instruct the jury regarding a lesser included crime sua sponte if, but only if, substantial evidence that a reasonable jury could find persuasive supports a guilty verdict of the lesser included rather than the charged crime. (*People v. Barton* (1995) 12 Cal.4th 186, 194-198; *People v. Cole*, *supra*, 33 Cal.4th at p. 1215.)

A defendant seeking to mitigate a killing from murder to heat of passion voluntary manslaughter must demonstrate both subjective heat of passion *and* objective provocation. (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.) "'[T]his heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances[.]'" (*Id*. at p. 1252.) In addition, to be entitled to voluntary manslaughter instructions, "the killing must be 'upon a sudden quarrel or heat of passion' (§ 192[, subd. (a)]); that is, 'suddenly as a response to the provocation, and not belatedly as revenge or punishment. Hence, the rule is that, if

sufficient time has elapsed for the passions of an ordinarily reasonable person to cool, the killing is murder, not manslaughter.' [Citation.]" (*People* v. *Daniels* (1991) 52 Cal.3d 815, 868.)

The provocations that Martinez points to are (1) Alvarado calling Hernandez a "fucking bitch" and (2) Alvarado hitting Hernandez. We find that neither of these is sufficient to support an instruction on sudden quarrel – heat of passion attempted voluntary manslaughter. As to Alvarado's insult, Martinez was not there to hear it or to have his passions aroused by it; he only heard it second-hand from Hernandez. Nor did he rush in spontaneously to respond to the insult; Hernandez ordered him to do so as vengeance or punishment, and he had time to consider what he was doing in following her into the restaurant, rather than reacting to a sudden provocation. Nor is the language Alvarado used, now unfortunately commonplace, sufficient to arouse a towering, murderous passion in an ordinary, reasonable person.

Alvarado's hitting Hernandez is also insufficient provocation to support an instruction under the facts and circumstances. Hernandez led Martinez into the restaurant looking for trouble, and the record indicates that Martinez knew this. Hernandez first verbally assaulted Alvarado and his friends without provocation, then attacked Alvarado physically without sufficient provocation. Under these circumstances, where Hernandez was the aggressor, we find that Alvarado's striking back in self-defense could not arouse a sudden, murderous passion in an ordinary, reasonable person.

Moreover, as with Martinez' other claims of error, there is no evidence Martinez was ever in a sudden passion. He offered no evidence to suggest that he was. The prosecution's evidence does not indicate heat of passion on his part. The evidence only shows that he saw the fisticuffs between Hernandez and Alvarado, then shot Alvarado after Hernandez and Alvarado were separated. Again, to suggest that Martinez was overcome by sudden heat of passion would be speculation, and such speculation is an insufficient basis for a mandatory instruction on a lesser included offense. (*People v. Valdez*, *supra*, 32 Cal.4th at p. 116.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, Acting P.J.

JACKSON, J.*

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* (Judge of the L. A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)